

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

November 6, 2008 Session

PENNY ANN BIGGAM MOSES v. ROGER DALE MOSES

Appeal from the Circuit Court for McMinn County
No. 26568 John B. Hagler, Judge

No. E2008-00257-COA-R3-CV - FILED MARCH 31, 2009

This is a divorce case. The trial court granted Penny Ann Biggam Moses (“Wife”) a divorce from Roger Dale Moses (“Husband”), valued and divided the marital assets, awarded Wife alimony *in solido*, and adopted Wife’s parenting plan pursuant to which Wife was made the primary residential parent of the parties’ two minor children. Husband challenges each of these determinations. Wife seeks an award of attorney’s fees and expenses on appeal. We affirm and grant Wife’s request for fees and expenses.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Randy G. Rogers, Athens, Tennessee, for the appellant, Roger Dale Moses.

D. Mitchell Bryant, Athens, Tennessee, for the appellee, Penny Ann Biggam Moses.

OPINION

I.

Husband and Wife were married in February 1979. The two had been high-school sweethearts; it was the first marriage for each. They had two children, a son born in December 1990 and a daughter born in January 1993. After 28 years of marriage, Wife filed for divorce in February 2006 citing irreconcilable differences and inappropriate marital conduct. In his counterclaim for divorce, Husband alleged irreconcilable differences and inappropriate marital conduct. Trial was held on March 30, 2007. At that time, Husband was 49 and Wife was 48. The parties’ son and daughter were ages 16 and 14, respectively.

When the parties married, Husband worked for the railroad; he continued to do so for the following 10 years. In 1988, he began working for Bowater. At the time of trial, Husband was

employed at Bowater as a shift supervisor. Wife is a high school graduate. She attended community college for one year. She worked throughout the marriage, including 10 years with Frigidaire. In the 10 years preceding the hearing below, Wife was employed on a part-time basis by the U.S. Postal Service as a rural mail carrier. As a part-time employee, she did not earn retirement credit and was not eligible for health insurance benefits. She had to provide her own vehicle and pay her fuel costs, but was given a monthly vehicle allowance. Both children attended Liberty Christian School, a private school in McMinn County.

According to Wife, the parties started experiencing trouble in their marriage when Husband turned 40 in 1998. Husband saw a counselor and was prescribed medication for depression, which he attributed to deaths in his family and marriage problems. Wife testified that before these problems arose, Husband was a “wonderful” husband and father and their marriage “was as perfect as it could be.”

Wife stated that Husband was an avid hunter and fisherman and that, in recent years, these activities began to interfere with his family life. She said of the five weeks' vacation he received each year, he would spend one with the family at a lake, and go on hunting trips the other weeks. Husband testified that in 2006 he went on 8 - 10 hunting trips but none in 2007. Wife denied that she had withdrawn from the marriage or refused to have relations with Husband. She said although Husband continued to tell her he was happy in the marriage, she knew that he was not.

The parties separated in July 2005. Wife said that the separation came after Husband began having long conversations with a young, married woman, Kim Duncan, that the parties knew through their church. Although Husband testified that Ms. Duncan was trying to help Husband and Wife with their marital problems, he acknowledges that he understood how his relationship with Ms. Duncan might upset Wife. Wife said that after she discovered Husband had unexpectedly gone to a church camp where Ms. Duncan was present, she became upset and told Husband not to return home because the locks would be changed. When Husband returned home the following day, he announced that he would live in the basement in order to be near the children. After Wife told Husband he could either be a part of the family or get out, Husband left and never returned. At the time of trial, Husband was living rent-free in return for “house-sitting” a residence that friends had listed for sale. According to Wife, Husband told her that he was leaving her because she was going through depression and menopause and he could not deal with her anymore. After the separation, Husband began depositing money in an account for Wife to pay expenses. He said he began decreasing the amount deposited because he could no longer afford the original amount. Wife said that she did not want a divorce but was forced to file in February 2006 because of her financial situation.

Husband had been seeing a woman, Sandy Morrow, since the divorce filing. According to Wife, Husband had cancelled some of his time with the children in favor of taking trips with Ms. Morrow. Husband acknowledged that he began spending time with Ms. Morrow in April 2006. Husband stated he was a very religious, moral person and had not had a sexual relationship with her although they had kissed and he felt affection for her. Husband testified that a private investigator he hired had found no evidence of an affair or other misconduct by Wife.

Regarding the children, Wife proposed a parenting plan that included standard co-parenting time for Husband of two weekends every month and other times as agreed to by the parties. Wife said that she did not envision any problems with time sharing because she felt it was important for the children to maintain a relationship with Husband. Husband said he and the children enjoyed a good relationship and spent time together hunting and doing other activities. Husband proposed an alternative, “co-parenting” plan under which he and Wife would share equal residential custody of the children. Husband stated that both he and Wife had been good parents. He acknowledged that the children had lived primarily with Wife during the separation.

The parties had owned their marital home for about 20 years.¹ According to the parties’ joint financial statement, the home was valued at \$172,000 and had a home equity line of credit against it in the amount of \$44,000. Wife said she had consented to the initial withdrawal of \$28,000 which was used to pay off a van Wife drove and a bass boat, but not to any further withdrawals. The monthly payment of \$600 was automatically deducted from Husband’s paycheck. Husband acknowledged Wife’s testimony that he handled all of their finances. Wife had two vehicles, a Ford Explorer that could only be used in her mail delivery job because its steering system had been altered for that purpose, and a 2005 Nissan Altima. She made the payments on both vehicles. She said that Husband, to her knowledge, had taken all of his personal property from the home. Wife made the monthly payments for a new washer and dryer she had purchased. Wife said Husband had an extensive collection of hunting and fishing gear, tools, a pontoon boat with a motor and trailer, a pull camper, and a fixed camper, which she had no interest in receiving. Wife said just before she filed for divorce, Husband sold another boat for \$15,000. She testified that she did not receive any of the proceeds.

Husband had a 401(k) at Bowater against which he had taken out loans. In addition, he had retirement accounts with Bowater and the railroad. Husband had a \$4,800 line of credit with Bowater of which Wife disclaimed any knowledge. Wife said she had no credit cards other than some department store cards. Wife paid the children’s private school tuition which amounted to \$3,000 per year for both children. The parties had a Bowater Visa card and a Bank of America Visa card. Wife testified that she normally paid for purchases with cash and described herself as a “thrifty” shopper. She said that, since the time of separation, Husband had made purchases on the parties’ two Visa cards that increased their balances approximately \$8,000 and \$7,000, respectively. Wife testified that her monthly expenses for herself and the children, not including a house payment, totaled \$3,810, while her income plus the anticipated child support equaled \$3,150 per month.

With respect to the marital estate, Wife proposed that she be liable for her two car payments and the appliance payment, that she be awarded the marital home and assume its debt, but that Husband continue to pay the house debt as lump sum alimony. Husband did not submit a plan. In his testimony, Husband proposed, regarding the house, that the court award him “[his] half of the appraised amount and pay off half of the loan against it or whatever.” Similarly, Husband said that he did not object to Wife retaining the household furnishings, but wanted the court to “somehow split those assets there equally.” Husband testified that up until the month before the trial, he had

¹The purchase date is not reflected in the record, but Wife testified that she had lived in the home for 21 years at the time of the hearing.

paid temporary child and spousal support of \$1557 a month as ordered by the court; in the last month, he was \$500 short of the required amount.² Husband testified that after he paid temporary child support and alimony and the marital debts, he had between \$80-\$100 remaining for personal expenses each month. According to Husband, the bulk of the increased balances on the parties' two Visa cards went toward gas, food and other basic expenses for himself and the children. In addition, Husband said he had obtained another credit card to meet his expenses, "just eating and surviving."

As reflected on the joint financial statement, Husband's gross monthly revenue was \$7,382 while Wife earned \$2,486 per month at the time of the hearing below. At the conclusion of the hearing, the trial court granted Wife a divorce on the ground of inappropriate marital conduct and essentially adopted Wife's plans regarding parenting and the distribution of the marital estate. The trial court dismissed Husband's counterclaim. Subsequently, the trial court filed its order setting forth its findings of fact and conclusions of law in relevant part as follows:

The Court having further reviewed the competing Permanent Parenting Plans filed by the parties in this cause finds the parenting plan filed by [Wife] . . . is the appropriate parenting plan to be entered . . . with a minor deviation, that being [Husband] shall be allowed to spend time with the children one afternoon per week, in order to visit with them or take them to eat, the time to be set and fixed by the parties in accordance with their schedules.

* * *

The Court further approves the child support worksheet in this matter, and it is therefore

ORDERED that [Husband] shall be required to pay unto [Wife] the amount of \$1,101 per month as child support for the support of the parties' two minor children.

The Court having fully reviewed all the facts and circumstances in this case finds that based upon all the statutory factors, including need and ability to pay, the length of the marriage, and to the extent appropriate relative fault in this cause, that this is an appropriate case for alimony, and it is therefore

ORDERED [Husband] shall pay to [Wife], as alimony *in solido*, the amount of \$600 per month, for a period of 84 months . . . and continuing until the full term of 84 months has been reached. As [Husband] is having drafted from his pay check the sum of \$625 per month for the payment on the home equity loan, which will become the responsibility of wife, [Husband] shall pay said alimony by allowing for the drafting of the home equity payment out of his pay check on a monthly basis. To the extent the payment on the home

²The order establishing temporary support is not included in the appellate record.

equity loan draft exceeds the \$600 per month in alimony, there shall be an appropriate off-set made against the monthly amount of child support paid to wife.

The Court specifically approves and adopts Wife's proposed distribution. . . . Pursuant to said [distribution], it is ORDERED that Wife shall receive as her sole and separate property, the home located at 127 Co. Rd. 478 Englewood, TN, along with all equity therein. Wife shall be responsible for the remaining indebtedness on said home, as represented by the home equity loan currently in place through Bowater Federal Credit Union in the approximate amount of \$44,000. Said home equity loan, shall be closed out as of the date of this divorce and no further draws shall be taken against the same.

It is further ORDERED Wife shall receive as her sole and separate property, the 2005 Nissan Altima and the 1997 Ford Explorer. Wife shall be sole[ly] and separately responsible for the payment of any remaining indebtedness on said vehicles. . . .

Wife shall receive all items of personal property currently in her possession as well as the washer and dryer and the debt associated with said washer and dryer. . . which shall be her sole and separate responsibility.

Wife shall receive one-half (1/2) of the value of Husband's pension, through the Bowater as of the date of this divorce.

Likewise, Wife shall receive one-half (1/2) of any and all benefits due her through Husband's Railroad Retirement, if any.

It is further ORDERED [Husband] shall receive the balance of the Bowater 401(k) account, and shall be sole[ly] and separately responsible for the payment of the loan indebtedness against said account. Further, he shall received the 2004 GMC Truck, free and clear of any claims by Wife, the pontoon boat, trailer and motor, Suzuki Samaria, all items of personal property in his possession including all his guns, bows, hunting and fishing equipment, and tools. Further Husband shall receive the pull camper and fixed camper as his sole and separate property.

It is further ORDERED Husband shall be sole[ly] and separate[ly] responsible for the payment of all remaining indebtedness . . . on the Bank of America Visa card, and upon both Bowater Visa cards, one of which is jointly held, and one of which is solely in his name. Husband shall hold Wife harmless from any liability thereon.

It is further ORDERED Husband shall be responsible for paying Wife's attorney's fees, in the amount of \$6,000 and shall be responsible for paying discretionary costs in the amount of \$616.75.

The trial court entered its judgment in May 2007. Husband sought a new trial, asserting that the trial court failed to fairly and equitably divide the parties' marital assets and debts, particularly with respect to the marital home. Husband further alleged that the trial court had allowed its assessment of fault to affect its division of the marital estate. The trial court denied the motion, and Husband timely appealed.

II.

On appeal, Husband raises the following issues:

1. Whether the trial court appropriately valued and equitably divided the marital estate.
2. Whether the trial court erred in awarding alimony in this cause.
3. Whether the trial court erred in failing to grant Husband appropriate co-parenting time with his children.

Wife raises an additional issue of whether she should be awarded her attorney's fees and costs on appeal.

III.

A.

Our review of the trial court's findings of fact is de novo upon the record of the proceedings below, accompanied by a presumption of correctness, a presumption we must honor unless the preponderance of the evidence is against those findings. Tenn. R. App. P. 13(d); **Wright v. City of Knoxville**, 898 S.W.2d 177, 181 (Tenn. 1995); **Union Carbide Corp. v. Huddleston**, 854 S.W.2d 87, 91 (Tenn. 1993). There is no presumption of correctness as to the trial court's conclusions of law. **Kendrick v. Shoemaker**, 90 S.W.3d 566, 569 (Tenn. 2002); **Campbell v. Florida Steel Corp.**, 919 S.W.2d 26, 35 (Tenn. 1996).

B.

A trial court has broad discretion in fashioning a division of marital property. **Fisher v. Fisher**, 648 S.W.2d 244, 246 (Tenn. 1983); **Barnhill v. Barnhill**, 826 S.W.2d 443, 449-50 (Tenn. Ct. App. 1991). It has the same broad discretion with respect to an award of alimony, *see* **Aaron v. Aaron**, 909 S.W.2d 408, 410 (Tenn. 1995), and in devising permanent parenting plans and designating the primary residential parent, *see* **Parker v. Parker**, 986 S.W.2d 557, 563 (Tenn. 1999).

In evaluating whether a trial court has abused its discretion, we are bound by the principle that the trial court “will be upheld so long as reasonable minds can disagree as to propriety of the decision made.” *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000) and *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)). A trial court abuses its discretion when it “applie[s] an incorrect legal standard, or reache[s] a decision which is against logic or reasoning that cause[s] an injustice to the party complaining.” *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999) (citation omitted). An appellate court cannot substitute its judgment for that of the trial court. See *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998).

IV.

A.

First, Husband contends generally that the trial court erred in its valuation of the marital property. In particular, he complains that the trial court failed to resolve the disputed values of certain items of personalty. The valuation of a marital asset is a question of fact, and the trial court's valuation is given great weight on appeal. *Powell v. Powell*, 124 S.W.3d 100, 103 (Tenn. Ct. App. 2003). In valuing marital assets, the trial court may consider all relevant evidence. See *Wallace v. Wallace*, 733 S.W.2d 102, 107 (Tenn. App. 1987).

The record reflects that the parties disagreed as to the value of Wife's 2005 Nissan Altima, the “household furnishings,” certain sporting equipment and tools. At trial, there was very little testimony regarding the value of any of these items. The joint financial statement shows that the total stipulated marital property was valued at \$331, 859 by Husband and at \$334, 594 by Wife. Each party generally relied on the assigned values as reflected in the financial statement. We observe that with regard to Wife's Nissan, it was valued at \$13, 000 by Husband and \$10,000 by Wife (with an agreed \$11,000 lien). In her proposed distribution plan, however, we note that Wife adjusted the value of the Nissan upwardly to \$12,000. The trial court did not make separate findings of fact regarding the disputed value of the items mentioned, but it did expressly approve and adopt Wife's distribution plan. “The burden is on the parties to produce competent evidence of the value, and the parties are bound by the evidence they present. Thus the trial court in its discretion, is free to place a value on a marital asset that is within the range of evidence submitted.” *Wallace*, 733 S.W. 2d at 107 (citations omitted). As previously noted, there was a minimum of evidence with respect to these now-disputed items. What evidence there is reflects relatively insignificant differences in the overall scheme of things. We conclude that the evidence does not preponderate against the trial court's findings on this aspect of the division of marital property.

B.

Next, Husband challenges the distribution of the marital estate as being generally inequitable. Husband contends that Wife was awarded a disproportionate share of the assets while he was assigned a disproportionate share of the debts. He argues that the trial court's assessment of fault certainly played a role in its division of the marital estate. In particular, Husband points to the award of the marital home and its equity to Wife as unfair.

Tenn. Code Ann. § 36-1-121 provides that the trial court shall consider all relevant factors in equitably dividing the marital property, including:

- (1) The duration of the marriage;
- (2) The age, physical and mental health, vocational skills, employability, earning capacity, estate, financial liabilities and financial needs of each of the parties;
- (3) The tangible or intangible contribution by one (1) party to the education, training or increased earning power of the other party;
- (4) The relative ability of each party for future acquisitions of capital assets and income;
- (5) The contribution of each party to the acquisition, preservation, appreciation, depreciation or dissipation of the marital or separate property, including the contribution of a party to the marriage as homemaker, wage earner or parent, with the contribution of a party as homemaker or wage earner to be given the same weight if each party has fulfilled its role;
- (6) The value of the separate property of each party;
- (7) The estate of each party at the time of the marriage;
- (8) The economic circumstances of each party at the time the division of property is to become effective;
- (9) The tax consequences to each party, costs associated with the reasonably foreseeable sale of the asset, and other reasonably foreseeable expenses associated with the asset;
- (10) The amount of social security benefits available to each spouse; and
- (11) Such other factors as are necessary to consider the equities between the parties.

Tenn. Code Ann. § 36-4-121(c) (2005).

In its distribution of the estate, the trial court, in its bench ruling, stated in relevant part as follows:

I don't think we would have the problem that we have in this case, except for these debts. And frankly, I still have no clear understanding of how the parties ended up with so much debt, except it's - - the one thing that's clear to me, it was not shown that the wife is responsible for that. She was not creating any debt during this period of separation. She was at home taking care of the children while the husband was going out and forming a new relationship and spending money there.

So I find that based upon their incomes - - . . . his is almost four times greater than hers, had she not been married these past 28 years, she would have a significantly greater income than she has, I believe. The husband's would have been about the same, probably, so she has definitely been disadvantaged financially by the marriage.

So I think it's appropriate that she take the house and that he take these debts according to her plan. I think it's far more equitable than the plan proposed by the husband

In the end, the trial court awarded the marital home and its furnishings to Wife along with her personal and business vehicles and assigned her the corresponding debt obligations on these properties and that of appliances she had purchased. Husband was awarded his 401(k) account valued at \$90,000 with a remaining balance of \$22,000 on a loan that he had taken out against it. In addition, Husband received his two personal vehicles, guns, bows, fishing equipment, tools, two campers, a boat and the value of another boat he sold, all of which property was unencumbered. Each party received one-half of the value of Husband's retirement accounts. Considering all assets and liabilities, the net award of the marital estate was approximately \$133,000 to Wife and \$90,000 to Husband.

In adopting Wife's plan, the trial court found that it was "far more equitable" than that proposed by Husband. The evidence does not preponderate against this finding by the trial court. This was a marriage of many years. The parties had disparate incomes and earning capacities. Both parties had consistently worked during the marriage, but Wife had been the primary homemaker and caregiver to the children. Neither does the evidence preponderate against the trial court's finding that Husband, rather than Wife, was responsible for much of the debt that accumulated since the parties separated. Dividing a marital estate is not a mechanical process; the goal is to fashion an equitable remedy by considering the factors set forth in Tenn. Code Ann. § 36-4-121(c). ***Kinard v. Kinard***, 986 S.W.2d 220, 230 (Tenn. Ct. App. 1998). In summary, a consideration of the relevant factors leads us to conclude that the trial court did not abuse its discretion in fashioning a distribution of the marital estate that favored Wife to a degree, particularly with respect to the award of the marital home. See Tenn. Code Ann. § 36-1-121(c)(1), (2), (5), (8), and (11).

We address Husband's related contention that fault played a role in the trial court's decision. The law on this point is clear: A trial court is not permitted to consider marital fault in equitably dividing the marital estate. See Tenn. Code Ann. § 36-4-121(a)(1). In its bench ruling, the trial court

commented that “[w]ith respect to the division of assets and liabilities, that is to be done without regard to fault, except that that can play some role *with respect to alimony* if the Court, in its discretion, deems that appropriate” (Emphasis added). The transcript indicates that the emphasized language was inserted by the trial court after the transcript was prepared. In addition, the trial court added the following notation: “I don’t know if I misspoke or if the reporter missed this. In any event, it does not matter since I did not consider fault with respect to assets and liabilities.” Further, in denying the motion for new trial, the trial court reiterated its remarks as follows:

In the division of the parties['] property, the Court can not, and did not in this cause, consider fault. The Court felt this was a long term marriage with two minor children. The Court further found [Wife] had, at great expense to her own independent career, been the primary house keeper and parent for the children during the course of the marriage.

The Court further found Husband has a career, and makes roughly three³ times [the] income of [Wife].

The Court felt the best approach in this case was for [Wife] to take the marital residence with the children.

The trial court accurately stated the law and declared that fault played no role in the division of the marital property. Nothing leads us to conclude otherwise.

V.

Next, Husband contends that the trial court erred in granting Wife alimony. In support of his argument, he concedes that his income is substantially greater than that of Wife, but asserts that this is only one factor to consider. He contends that the trial court, by its notations in the transcript, attempted to disavow that it applied fault “to the consideration of the award of alimony, or in the alternative, the division of property.” Husband concludes that either the division of property or the award of alimony should be modified because the trial court’s decree makes it “impossible for him to continue to live at any comfort level.” Husband offers no legal support or citations to the record in support of his argument.

We have already discussed our conclusion that there was no abuse of discretion in the division of the marital estate. Although Husband insists that the trial court considered fault in its distribution of the marital estate, the trial court twice expressly stated that it did not. Since the record does not indicate otherwise, we take the trial court at its word.

³ As reflected on their joint financial statement, Husband’s and Wife’s net monthly incomes at the time of the hearing were \$6,030 and \$2,056, respectively. Accordingly, the trial court’s observation that Husband earns roughly three times more than Wife is more accurate than the earlier calculation made in its bench ruling.

The award of alimony is a different matter. The trial court correctly indicated that fault was one factor it could, within its discretion, consider. *See* Tenn. Code Ann. § 36-5-121(i)(11). Nonetheless, it did not expressly assign fault in determining alimony. Instead, the trial court found that alimony was appropriate in this case, with the “crucial issue being Wife’s need and the Husband’s ability to pay, along with their respective earning powers” As noted, the trial court awarded Wife alimony *in solido* of \$600 per month for a term of seven years to coincide with the contemplated period in which the corresponding debt on the home equity credit line would be satisfied. Alimony *in solido*, or lump sum alimony, is a form of long term support. *See* Tenn. Code Ann. § 36-5-121(h)(1)(2005). The “real need of the [disadvantaged] spouse seeking the support is the single most important factor . . . [and next] the courts most often consider the ability of the obligor spouse to provide support.” *Aaron v. Aaron*, 909 S.W.2d at 410. (citation omitted). When the alimony award is measured against the relevant factors set forth in Section 36-5-121(i), we cannot say that the award was an abuse of the trial court’s broad discretion.

VI.

Husband next contends that the trial court erred in failing to award him equal co-parenting time. Husband again fails to cite any legal authority or reference the record in support of this issue. As noted, the trial court adopted Wife’s proposed parenting plan under which the children would reside with her the majority of the time with co-parenting time for Husband. The trial court did modify Wife’s plan to include additional time during each week with Husband “except as it may affect grades or something of that nature because schooling is very important at this time.” In addition, holidays, vacation days, and other dates of special significance were divided equally between the parties.

“By statute as well as case law, the welfare and best interest[] of the child are the paramount concern in custody, visitation, and residential placement determinations, and the goal of any such decision is to place the child in an environment that will best serve his or her needs.” *See Burden v. Burden*, 250 S.W.3d 899, 908 (Tenn. Ct. App. 2007)(quoting *Cummings v. Cummings*, M2003-00086-COA-R3-CV, 2004 Tenn. App. LEXIS 676, at *13 (Tenn. Ct. App. M.S., filed October 15, 2004). Tenn. Code Ann. § 36-6-404(b) sets forth a lengthy list of factors to be considered in developing a residential schedule as part of a permanent parenting plan. Among these factors are three considered by the trial court: the “love, affection, and emotional ties existing between each parent and the child[ren],” the “degree to which a parent has been the primary care giver. . . ,” and the “importance of continuity in the child’s life and the length of time the child has lived in a stable, satisfactory environment.” *See* Tenn. Code Ann. § 36-6-404(b)(6), (7) and (11). With respect to these factors, the trial court observed that “both parents love and nurture the children, and the children . . . love them and need to be with them.” The trial court further found, however, that Wife had been the “primary housekeeper and parent for the children during the course of the marriage” and that “[Wife] is remaining at home with the children, and that needs to be their primary residence.” The trial court thus found that although both parents had strong bonds with the children, it was in their best interest to remain in the home in which they were raised with Wife continuing to serve as their primary caregiver. The evidence does not preponderate against the trial court’s findings.

We further observe that in adopting Wife's parenting plan, the trial court simply directed that the parties would continue to operate under the same parenting arrangement that they had utilized since their separation. That is, in the nearly twenty months since Husband and Wife separated, the children had resided in the marital home with Wife but regularly spent time with Husband. We conclude that the trial court did not abuse its discretion in maintaining this arrangement in favor of Husband's proposed 50/50 parenting plan.

VII.

Lastly, we consider Wife's request that she be awarded fees for her attorney's services on this appeal. Wife asserts that the attorney's fees awarded to her in the trial court have not yet been paid, and she is without the financial means to pay her attorneys to answer Husband's appeal.

The decision whether to award attorney's fees on appeal is a matter within the sole discretion of this court. *See Archer v. Archer*, 907 S.W.2d 412, 419 (Tenn. Ct. App. 1995). The appellate courts in this state have set forth the factors that should be applied when considering a request for attorney's fees incurred on appeal. These factors include the ability of the requesting party to pay fees, the requesting party's success in the appeal, whether the requesting party sought the appeal in good faith, and any other equitable factor that need be considered. *See Dulin v. Dulin*, W2001-02969-COA-R3-CV, 2003 Tenn. App. LEXIS 628, 2003 WL 22071454, at *10 (Tenn. Ct. App. Sept. 3, 2003) (citing *Folk v. Folk*, 210 Tenn. 367, 357 S.W.2d 828, 829 (Tenn. 1962)). In weighing the above factors in light of the particular facts of this case, we exercise our discretion by awarding Wife her attorney's fees and expenses on appeal. On remand, the trial court will determine a reasonable attorney's fee and expense award for Wife.

VIII.

The judgment of the trial court is affirmed. This case is remanded to the trial court, pursuant to applicable law, for enforcement of its judgment and for collection of costs assessed below. On remand, the trial court is directed to enter an order granting Wife her reasonable attorney's fee and expenses as additional alimony *in solido*. Costs on appeal are taxed against the appellant, Roger Dale Moses.

CHARLES D. SUSANO, JR., JUDGE